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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/762,232	02/05/2001	Lorraine Mignault	82223-202	1664

7590 05/05/2004

Ade & Company
1700 360 Main Street
Winnipeg, R3C 3Z3
CANADA

EXAMINER	
WANG, SHENGJUN	

ART UNIT	PAPER NUMBER
1617	

DATE MAILED: 05/05/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/762,232	MIGNAULT, LORRAINE	
	Examiner	Art Unit	
	Shengjun Wang	1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *04 December 2003*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1,2,5-9,17-22,24-26 and 28-30* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1,2,5-9,17-22 and 24-26,28-30* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on December 3, 2003 has been entered.

Claim Rejections 35 U.S.C. 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

2. Claims 1, 2, 5-9, 17-22, 24-26, 28-30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Weed (of record) in view of Puchalski, Jr. et al. (of record) and Jakobson et al. (of record), in further view of Ito (US 5,055,189), or Patrasenko et al.

3. Weed teaches hot water extraction of oatstraw (see page 205). The extracts are in the form of oatstraw baths. Weed states "use an oatstraw footbath to soak away stink, sweat, cold, and pain from your tender tootsies," (page 205). For purposes of examination, water as disclosed by Weed is considered to be equivalent to "filtered and magnetized water" as claimed in claim 2. Weed teaches the use of aqueous extracts of oatstraw applied externally to treat pain from any internal distress, including uterine pain. For purposes of examination, uterine pain is considered to meet the limitation of menstrual cramps. Weed also teaches the use of the extract for treating

skin diseases, flaky or dry skin, wound, and eye irritations. A bath composition meets the limitation of body wash. Weed further teaches that it is well known that oat straw provide many health related benefit, including reducing pain (see pages 200-205). Infusion is one of the common forms of oat straw composition well employed (page 200). Note, ordinary skill in the art would understand that infusion is liquid product obtained by infusing, and infuse mean to steep or soak in order to extract soluble elements or active ingredient (see dictionary definitions of "infusion" and "infuse," American Heritage Dictionary).

4. Weed does not teach expressly to make water extract of oatstraw as herein claimed, or the addition of glycerin and lavender oil, as well as weight percentages of the same and teaching of a process for preparing a composition by addition of the components.

5. However, Puchalski teaches shampoo and bath and shower gels. Puchalski teaches that a polyol to enhance skin feel may be present in the compositions, including glycerin (see col. 3, lines 22-32). Jakobson teaches the addition of oils such as lavender oil in order to impart a medicinal activity to the composition in that the oil exert a relieving or healing action on the human body and/or exhibit a therapeutical activity by means of relaxing, refreshing, or vitalizing effect.

6. It would have been obvious to one of ordinary skill in the art at the time the invention was made to make a water extract (infusion, or tincture) and combined with glycerin in order to benefit from the enhanced skin feel imparted by glycerin as taught by Puchalski and by the addition of lavender oil in order to benefit from the relieving or healing action of lavender oil as taught by Jacobson.

7. One of ordinary skill in the art would have been motivated to make a water extract (infusion, or tincture) because oatstraw are known to provide many health related benefit and the active ingredients are soluble in water. With respect to the weight percentages of the components, differences in concentration will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration is critical. Where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable range by routine experimentation. In re Aller 220 F.2d 454, 105 USPQ 233, 235 (CCPA 1955). With respect to the claimed process for preparing the composition, the process involves combining the recited components. It is the position of the examiner that a process for preparing a composition which merely the process of combining the components is render obvious by the composition itself. With respect to the limitation of "magnetically treated water," note the employment of magnetically treated water for preparing therapeutical composition would have been obvious in view of Ito, or Patrasenko et al. Ito, or Patrasenko et al teach magnetic treatment provide cleaner water. See column 1, lines 45-67 in Ito and the abstract of Patrasenko et al. It would have been obvious to one of ordinary skill in the art to using clean water to make therapeutical composition.

Response to the Arguments

Applicants' amendments and remarks submitted December 3, 2003 have been fully considered, but are not persuasive for reasons discussed below.

First, it is noted that the infusion disclosed in Weed is an oatmeal infusion, not oatstraw infusion. As discussed above, oatstraw infusion is closely related to the claimed subject matter

herein. In fact, the procedure claimed herein is no more than an infusing process, which is quite obvious to one of ordinary skill in the art.

8. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In the instant case, one of ordinary skill in the art would have known to remove the residue of the oatstraw for reasons discussed above. Particularly, note it would have been obvious to one f ordinary skill in the art at the time the invention was made, that most of the active ingredients of oatstraw would have been extracted into water when "extracted with boiled water." Therefore, using water extract only by filtering out the residues is an obvious alternative of keeping the residue in the water extract, especially when a commercial extract is made. Weed does not teach against filtering. What Weed taught is a particularly situation, wherein the extract is made *in situ*. What Weed is saying is that it is not necessary to remove the residue.

9. The remarks about the magnetically treated water are moot in view of the new ground of rejection.

10. The examiner agrees that Weed reference does not teach expressly the particular steps herein for extract the active ingredients of oatstraw. However, Weed teach the employment of heated water infusion for providing health benefit, suggesting the active ingredients are soluble

in heated water, it would have been obvious to use water as solvent for making infusion or tincture, as suggested by Weed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Shengjun Wang, Ph.D. whose telephone number is (571)272-0632. The examiner can normally be reached on Monday-Friday from 8:30 to 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan, can be reached on (571)272-0629. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9302.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (571) 272-1600.

S. Wang

Shengjun Wang

April 28, 2004